Supreme Court, U.S.
FILED
DEC 8 1994
OFFICE OF THE CLERK

No. 94-859

# In The Supreme Court of the United States

October Term, 1994

---

Bruce Babbitt, Secretary of the United States Department of the Interior, *et al.*,
*Petitioners,*

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

*Of Counsel:*
William R. Murray
American Forest & Paper Association
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036

John A. Macleod *
Steven P. Quarles
Clifton S. Elgarten
Thomas R. Lundquist
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
*Attorneys for Respondents*

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

## QUESTION PRESENTED

Under Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1), it is unlawful for any person to "take" an endangered fish or wildlife species. The Act defines "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The question presented is:

Whether the U.S. Fish and Wildlife Service's regulation defining "harm" was correctly held invalid by the court below to the extent that it prohibits ordinary land uses which are not directed against protected wildlife but which may inadvertently injure such wildlife?

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iv |
| STATEMENT | 1 |
| REASONS FOR DENYING THE WRIT | 7 |
| CONCLUSION | 22 |

## TABLE OF AUTHORITIES

CASES — Page

*Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 115 S.Ct. 62 (1994) ..... 8
*Central Bank of Denver v. First Interstate Bank of Denver*, —— U.S. ——, 114 S. Ct. 1439 (1994) ..... 19
*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... 6, 7, 21
*Crandon v. United States*, 494 U.S. 152 (1990) ..... 21
*Forest Conservation Concil v. Rosboro Lumber Co.*, No. 94-35070 (9th Cir.) ..... 17
*Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976), *aff'd in pert. part*, 549 F.2d 1064 (6th Cir. 1977) .. 20
*Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961) .. 11
*Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483 (1994) ..... 20
*National Wildlife Federation v. Burlington Northern RR*, 23 F.3d 1508 (9th Cir. 1994) ..... 20
*Pacific Northwest Generating Cooperative v. Brown*, 25 F.3d 1443 (9th Cir. 1994), *amended by*, 1994 WL 524623 (9th Cir. June 3, 1994) ..... 17
*Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) ..... 16, 17
*Reno v. Flores*, —— U.S. ——, 113 S. Ct. 1439 (1993) ..... 10
*Ruff v. Sullivan*, 907 F.2d 915 (9th Cir. 1990) ..... 17
*Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ..... 20
*U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, —— U.S. ——, 63 U.S.L.W. 4005 (U.S. Nov. 8, 1994) ..... 17
*United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993), *amended*, 22 F.3d 859 (9th Cir. 1994) ..... 4, 12, 17
*United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990) ..... 2
*United States v. Plaza Health Laboratories*, 3 F.3d 643 (2d Cir. 1993), *cert. denied sub nom. United States v. Villegas*, 114 S .Ct. 2764 (1994) ..... 8
*United States v. Thompson/Center Arms Co.*, —— U.S. ——, 112 S. Ct. 2102 (1992) ..... 21

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. X-Citement Video, Inc.*, —— U.S. ——, 63 U.S.L.W. 4019 (U.S. Nov. 29, 1994) | 21 |
| *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 322 (1994) | 8 |
| **STATUTES** | |
| The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 | 2 |
| ESA § 3(13), 16 U.S.C. § 1532(13) | 2 |
| ESA § 3(19), 16 U.S.C. § 1532(19) | 2 |
| ESA § 4, 16 U.S.C. § 1533 | 2, 9 |
| ESA § 5, 16 U.S.C. § 1534 | *passim* |
| ESA § 7, 16 U.S.C. § 1536 | *passim* |
| ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) | 4, 5 |
| ESA § 9, 16 U.S.C. § 1538 | *passim* |
| ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) | 2 |
| ESA § 9(a)(2), 16 U.S.C. § 1538(a)(2) | 2, 4 |
| ESA § 11(b), 16 U.S.C. § 1540(b) | 2 |
| ESA § 11(a), (e)(6) and (g), 16 U.S.C. § 1540(a), (e)(6) and (g) | 3 |
| 18 U.S.C. §§ 3559, 3571 | 2 |
| **LEGISLATIVE HISTORY** | |
| *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., 104 (1973) | 14 |
| 119 Cong. Rec. 25669 (July 24, 1973) | 14 |
| 119 Cong. Rec. 25682-83 (July 24, 1973) | 12 |
| 119 Cong. Rec. 30162 (Sept. 18, 1973) | 5, 14 |
| **REGULATIONS** | |
| 50 C.F.R. § 17.3 | 2, 16 |
| 50 C.F.R. § 17.31(a) | 2 |

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

A. Gidari, *The Endangered Species Act: Impact Of Section 9 On Private Landowners*, 24 Envtl. L. 419 (1994) ..... 11, 15

C. Mann and M. Plummer, *The Butterfly Problem*, The Atlantic Monthly, Jan. 1992, 47 ..... 18

M. Bean, *The Evolution Of National Wildlife Law* (GPO 1977) ..... 5

R. Lachenmeier, *The Endangered Species Act Of 1973: Preservation Or Pandemonium?*, 5 Envtl. L. 29 (1974) ..... 15

R. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 Nat. Res. & Env. 21 (Summer 1993) ..... 18

Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* (7th ed. BNA 1993) ..... 17

Supreme Court Rule 10.1 ..... 8

Supreme Court Rule 29.1 ..... 1

*Webster's Third New International Dictionary (Unabridged)* (Merriam 1968) ..... 12, 13

*1B Moore's Federal Practice* ¶ 0.402[2] (Matthew Bender 1993) ..... 17

46 Fed. Reg. 29491 (June 2, 1981) ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-859

---

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,
*Petitioners,*

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

Respondents [1] respectfully pray that the Court deny the Petition filed by Secretary of the Interior Bruce Babbitt and United States Fish and Wildlife Service Director Mollie H. Beattie (collectively, "Petitioners" or "FWS").

## STATEMENT

The two main opinions below (Pet. App. 1a-24a and 89a-96a) fairly set forth the facts and law necessary to dispose of this Petition. Sweet Home supplements the Petitioners' statement of the case in a few respects below.

---

[1] Pursuant to this Court's Rule 29.1, the corporate Respondents (Erickson Busheling, Inc.; Ridgetree Logging Co.; Shotpouch Logging Co.) are privately held corporations, with no parent or subsidiary companies. The individual, corporate and association Respondents will be collectively referred to as "Sweet Home."

1. Section 9 of the Endangered Species Act ("ESA" or "Act") makes it unlawful for any "person" (which includes all private and public entities, *see* 16 U.S.C. § 1532(13)) to "take" any "endangered species of fish or wildlife listed pursuant to section 1533."[2] "'[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). FWS's regulation defines "harm" to include a land use action which modifies habitat (*e.g.*, clearing brush, plowing fields, cutting trees) if the action indirectly leads to the death or "injury" of listed wildlife:

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

Violations of the "harm" regulation may be prosecuted criminally, with penalties of up to one year in jail and a $200,000 fine for each "take."[3] Civil penalties and in-

---

[2] 16 U.S.C. § 1538(a)(1)(B). The Petition (at 4 and n.2) incorrectly states that "the 'take' prohibition applies to all listed species." "Take" applies only to listed *wildlife* species, since § 9(a)(1) applies to endangered "fish or wildlife" and 50 C.F.R. § 17.31(a) extends the "take" prohibition to most threatened "wildlife." There is no ESA provision on "take" of listed *plant* species and a landowner may remove and destroy a listed *plant* species. 16 U.S.C. § 1538(a)(2).

[3] 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571. The "knowingly" standard under § 1540(b) apparently would require only a general intent to perform an act, not a specific intent to violate the law. *E.g., United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990). Thus, a person who intentionally cuts a tree and thereby unintentionally injuries listed wildlife may well be criminally liable under the "harm" regulation.

junctive relief are also available. 16 U.S.C. § 1540(a), (e)(6) and (g).

2. After the "harm" regulation was used to impose restrictions on Respondents' timber harvesting, Respondents filed this suit to allege that the "harm" regulation's application to ordinary land uses violated the ESA. *See* Complaint at ¶¶ 4-14, 17-27. This *ultra vires* challenge —the first such challenge ever brought—was rejected in the district court (Pet. App. 73a) and initially in the court of appeals in a conclusory 2-1 *per curiam* opinion (Pet. App. 46a).

Judge Sentelle dissented from the initial *per curiam* opinion based on a straightforward reading of the Act's "take" definition; he would have found the "harm" regulation adopted by the FWS exceeded the agency's powers under the Act. Pet. App. 68a. Judge Williams, in a separate opinion, indicated his agreement that the "harm" regulation could not be squared with the language of the 1973 ESA, but he believed that the 1982 ESA amendments could be read to impliedly ratify the rule. Pet. App. 67a. He therefore joined with Judge Mikva (Pet. App. 59a) to uphold the regulation.

3. Sweet Home's petition for rehearing was directed in part at the legislative ratification theory which Judge Williams initially had found persuasive. Judge Williams, on rehearing, agreed with Sweet Home's position and authored the March 11, 1994 majority opinion. Pet. App. 1a-24a (17 F.3d 1463). Relying on the Act's definition of "take," its overall structure, and its legislative history, the court concluded that the "harm" regulation is invalid in "embrac[ing] habitat modifications." Pet. App. 24a.

Since "harm" can have narrow and broad meanings, the court looked to the way the term was used in the Act. This common sense approach is encapsulated in the *noscitur a sociis* principle—that indefinite words in a list (such as "harm" in the list of words comprising the ESA

definition of "take") derive meaning from neighboring words. Pet. App. 3a-6a. The court noted that each of the other terms in the Act's definition of "take" involve "a substantially direct application of force, which the Service concept of forbidden habitat modification altogether lacks." Pet. App. 5a-6a.[4] Thus, the court found that, when "harm" is read in its ESA context, FWS's interpretation of that term is impermissibly broad.

The court then considered the relationship among the ESA's different sections. It noted, in particular, that the Act "pursues its conservation measures through three basic mechanisms:" (1) a federal land acquisition program under § 5 (16 U.S.C. § 1534); (2) the imposition, under § 7 (*id.* § 1536), of strict obligations on federal agencies to avoid adverse impacts on endangered species; and (3) § 9's prohibition (*id.* § 1538) on the taking of endangered species by anybody. Pet. App. 7a. It concluded that the structure of the ESA is rational and nonconflicting only if § 7 "imposes very broad burdens on the [federal government], including the avoidance of adverse habitat modifications," while § 9's "take" and other prohibitions place on "every person . . . [only] relatively narrow" burdens. Pet. App. 7a-8a.

Thus, by its interpretation of the ESA § 9 concept of "harm" to prohibit any ordinary land use (*i.e.*, a "habitat modification") by any public or private entity whenever the use happens to injure *one* member of a listed wildlife species, FWS eliminates any need for ESA § 7(a)(2), which imposes duties on a "Federal agency" to not "jeopardize the continued existence" of an *entire* listed species

---

[4] As the opinion notes, the Ninth Circuit applied this principle to similarly limit the "take" prohibition under the Marine Mammal Protection Act to a "direct" intrusion against the listed species. Pet. App. 5a, *quoting United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993). Though FWS sought rehearing *en banc* in *Hayashi*, the effort was unsuccessful. The opinion, reported at 22 F.3d 859 (9th Cir. 1994), reaffirms *Hayashi* with a few minor language changes.

or cause the "destruction or adverse modification of [the designated critical] habitat" of such species.[5] The "harm" regulation has unlawfully "transposed to the private" sector habitat protection duties which the ESA places only on the federal sector.[6] Pet. App. 7a.

The court next examined the ESA legislative history, which confirmed that "harm" and other ESA "take" components cannot fairly be read to encompass ordinary land uses which adversely modify habitat. First, the ESA floor managers for both the House and Senate "differentiated loss of habitat [which would be addressed through compensatory land acquisition under ESA § 5] from the hazard that was the target of the 'taking' ban." Pet. App. 9a. ESA § 5 (16 U.S.C. § 1534) provided "funds for acquisition of critical habitat" precisely because Congress only desired cooperation with "willing landowners"—Congress did not want to prohibit land uses as "takes" without compensation. 119 Cong. Rec. 30162 (Sept. 18, 1973) (remarks of House floor manager Sullivan), *quoted in* Pet. App. 8a-9a.

Second, Congress "deliberate[ly] delet[ed] habitat modification from the definition of 'take'" despite environmental group testimony that the language was needed to prevent land uses which indirectly injure

---

[5] *See* Pet. App. 92a-93a. If "harm" prevents anyone from adversely modifying habitat to the detriment of even one individual member of a listed species, as FWS's regulation asserts, "then it is at least doubtful whether Section 7 of the Act is even necessary." M. Bean, *The Evolution Of National Wildlife Law* 397 (GPO 1977), *quoted in* Pet. App. 93a.

[6] The power that ESA § 7 vests in the "federal sector" is broader than first meets the eye. The federal agency duties under § 7(a)(2) apply not only to all activities on all federal lands, but also to the myriad of activities on private lands that cannot occur without federal agency action—such as the funding of a project or the issuance of a permit. As many major private land projects require some sort of federal authorization, § 7 by itself constitutes a significant mechanism for controlling habitat modification activities on private lands.

listed wildlife. Pet. App. 9a-10a. The "harm" regulation unlawfully attempts to adopt by regulation a concept—"take" includes habitat modifications which inadvertently injure listed wildlife—that Congress deleted from the ESA. *See id.*

Finally, the court concluded that the 1982 ESA amendments could not and did not retroactively ratify the 1981 "harm" regulation. Pet. App. 10a-24a. Judge Sentelle joined in the majority opinion and filed a short concurring opinion. Pet. App. 25a. Judge Mikva, finding "the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of 'take,' " dissented on the ground that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), required deference to FWS's interpretation. Pet. App. 34a.

4. The legality of the "harm" regulation was briefed a third time at the appellate level when FWS sought rehearing. On August 12, the full D.C. Circuit announced a 7-4 vote to deny rehearing *en banc*, and two opinions were filed. Pet. App. 89a-99a (30 F.3d 190). Judge Williams' opinion denying a panel rehearing summarizes how the "harm" regulation exceeds statutory limits:

> [T]he statute, fairly read in light of the "traditional tools of statutory interpretation," manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications as defined by the Department [of the Interior], where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly imposed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill. The extension vests the Department with authority to

> supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. . . . Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.

Pet. App. 95a-96a.

Judge Silberman filed a dissenting opinion, joined in by two other judges. He urged *en banc* review and favored argument on the question whether, "[k]eeping in mind that we are dealing with a criminal statute, . . . *Chevron* even governs our review." Pet. App. 97a. Although he stated that he would likely have accorded more deference to the agency's interpretation than did the panel if *Chevron* did apply, Judge Silberman too was troubled by the breadth of the "harm" regulation:

> Were I interpreting this statute without deference, given its language and legislative history, I would certainly be troubled about any construction that might preclude a landowner from using his property for ordinary purposes just because it could be thought that an endangered species was somehow disadvantaged.

Pet. App. 98a.

## REASONS FOR DENYING THE WRIT

The Petition to review this statutory interpretation case should be denied. In the course of three separate visits to the court below and review by all of its judges, this case has been thoroughly considered and thoughtfully decided. Although Petitioners argue that the decision is wrong (Pet. at 12-21), an allegedly incorrect result does not warrant review unless the decision below "has so far departed from the accepted and usual course of judicial proceedings" that it calls out for this Court's supervisory

review. Rule 10.1(a). This case does not meet the exacting standard.[7]

1. Petitioners' lead argument—that this is a "facial" challenge to the "harm" regulation, and that Sweet Home failed to meet its alleged burden of showing the absence of any circumstances under which the regulation would be valid (Pet. at 12-13)—is a red herring.

Notably, the importance FWS assigns to the "facial" nature of the challenge escaped the attention of any of the judges below, whether in the majority or the dissent. FWS did not present to the district court, the original panel, or the rehearing or *en banc* panels, the authority it now emphasizes as the appropriate standard for reviewing a "facial challenge." It is therefore difficult to see how this undiscussed issue could be a proper focal point for a grant of certiorari.

Moreover, the judges below did not have to wrestle with the conceptual difficulties raised by the "facial challenge" argument because the argument leads nowhere. FWS adopted a "harm" definition that prohibits, indeed criminalizes, actions which unintentionally injure listed wildlife. The court below held that such a definition sweeps too broadly because it leaves out an essential element of the type of conduct meant to be prohibited by ESA § 9—an action which is directed at listed wildlife. Thus, the court's decision can only be read as invalidating the "harm" regulation to the extent that it encompasses ordinary land use actions which are taken for a legitimate

---

[7] The Court has recently denied review in similar statutory interpretation cases where the courts below had adopted narrowing interpretations of the Clean Water Act. *E.g.*, *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 322 (1994); *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 62 (1994); *United States v. Plaza Health Laboratories*, 3 F.3d 643 (2d Cir. 1993), *cert. denied sub nom. United States v. Villegas*, 114 S. Ct. 2764 (1994).

purpose and are not directed against such wildlife. *See* Pet. App. 95a.

What this means, of course, is that the "harm" regulation is overbroad in every application: it authorizes injunctive relief and criminal penalties upon a mere showing that the innocent use of one's land has the unintended effect of injuring listed wildlife.

It is unavailing to suggest (*e.g.*, Pet. at 25-26) that there might be theoretical circumstances in which "habitat modification" might be purposefully used to eliminate listed wildlife from a site. That is not an issue: such an action, if directed at wildlife, can be prohibited or punished under the Act as it is currently written.[8] But under the "harm" regulation, a court or agency applying the statute would never reach that narrow universe of applications involving actions actually directed against wildlife because it is sufficient that an action affects the subject wildlife.

The various narrowing constructions FWS suggests concern a different point entirely—and thus do not meet the fundamental flaw in the regulation, identified by the decisions below. FWS focuses on the regulation's requirement that prohibited habitat modification be "significant," and that it "actually" as opposed to "potentially" cause injury (Pet. at 19). This goes to the class of prohibited effects; the concern of the court of appeals lay elsewhere, in the way the regulation addressed the actions causing those effects. What rendered the "harm" regulation fundamentally inconsistent with the other words defining "take"

---

[8] If the actions are not directed against listed wildlife, of course, FWS can prevent any significant adverse effects they might have under the Act's other provisions—by designating "critical habitat" on public or private land under § 4, 16 U.S.C. § 1533(b)(2), by prohibiting or conditioning potentially adverse federal actions that are likely to adversely modify the critical habitat or otherwise jeopardize the species' continued existence under § 7, *id.* § 1536, or by acquiring sensitive lands and waters under § 5, *id.* § 1534.

and the overall structure of the Act was that it prohibited, indeed criminalized, actions of private citizens which merely affected wildlife, but which were not, in any respect, directed against wildlife.

Moreover, this is not a case where the regulation is new and there is doubt about its manner of application. FWS has made it clear that the "harm" regulation means precisely what it says and has repeatedly applied it to convert the ESA into a vehicle for constraining ordinary land uses by private citizens, where the inadvertent effect of those land uses may be injury to listed wildlife. The Petition itself describes some of those applications and some resulting court decisions in enforcement cases. Pet. at 19-21.

As such, this case is in no respect like *Reno v. Flores*, —— U.S. ——, 113 S.Ct. 1439 (1993), on which Petitioners principally rely for their "facial challenge" argument. There, the regulation had never "been applied in a particular instance" (*id.* at 1446), and much of the challenge was based on a fear—unsupported by evidence —that the regulation might be applied in ways that would raise special problems. *E.g.*, *Reno*, 113 S.Ct. at 1451 (absence of specific time period for hearing does not invalidate regulation because court cannot simply "assume, on . . . facial challenge, that an excessive delay will invariably ensue"). Here, in contrast, the "harm" regulation has been used to constrain timber harvesting by Respondents and others similarly situated, and that manner of application formed the basis for this suit.[9]

---

[9] *See* Complaint ¶¶ 4-14, 23-26; Pet. at 8 (Respondents "are engaged in, or depend upon timber harvesting" and "allege that they are affected by the 'harm' regulation because of its application to the northern spotted owl" and red-cockaded woodpecker); Pet. App. 76a (similar description by district court). For example, FWS's "owl guidelines" interpreted "harm" to require that timber harvesting be avoided on up to 3,960 acres surrounding each spotted owl nest site, without any evidence or even allegation

2. As the foregoing suggests, there is nothing remarkable about the decision below. The court of appeals interpreted a single word in a single statute. Its interpretation that the "take" prohibition in ESA § 9 does not extend to ordinary land use actions which may inadvertently injure listed wildlife, as it would under the "harm" regulation, accords with everyday understandings. As Judge Sentelle observed:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife.

Pet. App. 69a.

The court's analysis of the issue began, of course, with the statutory text. Observing that "the nine verbs accompanying 'harm' [in the Act's definition of "take"] all involve a substantially direct application of force," the court reasoned that the term "harm" had been used in that sense as well. Pet. App. 5a. It thus applied the *noscitur a sociis* principle to understand the meaning of "harm" as used in the Act and thereby "avoid the giving of unintended breadth to the Acts of Congress." Pet. App. 5a-7a, *quoting Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). It is here that FWS launches its principal attack on the court's decision. But its three arguments are easily dealt with, and provide no basis for this Court's review.

Petitioners first offer two dictionary definitions to show that "harm" can be broadly used. Pet. at 13. This proves nothing since "harm" can also have narrow meanings,[10]

---

of injury to, or intention to injure, a single spotted owl. Complaint ¶ 24; *see* A. Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 426-40 (1994).

[10] Every dictionary adheres to the principle that, where a word has two or more meanings, the *context* in which it is used is the

as the court below acknowledged. Pet. App. 3a-4a. The issue is how it was used here. The *noscitur a sociis* principle avoids giving "harm" a breadth that Congress never intended in the Act. The court's use of that principle was particularly appropriate since "harm" was added to the list of "take" terms, with no discussion, as part of a package of 24 "technical" amendments on the Senate floor. 119 Cong. Rec. 25682-83 (July 24, 1973). To give the term a meaning that would subsume and expand dramatically upon all the others was simply implausible.

FWS next claims that the court's reliance on *noscitur a sociis* was misplaced. It argues, without citing any authority, that "that proposition . . . has no merit here," and apparently seeks to bolster that assertion by dividing —without reference to a dictionary this time—the component terms of the Act's "take" definition into two categories. Pet. at 14. Apart from its own weightlessness, this argument overlooks the court's company in applying the principle. The Ninth Circuit, with which FWS claims the decision below is in conflict, relied on *noscitur a sociis* to similarly limit the "take" definition under the Marine Mammal Protection Act. In *Hayashi*, 22 F.3d at 864, that Circuit held that "harass" (contrary to FWS's effort to portray the same term in the ESA as a benign term that 'weighs against the court of appeals' crabbed interpretation" (Pet. at 14)) must involve a "direct intrusion" against a listed species to be a "take." Even more strikingly opposed to its present position, FWS itself, in a published legal opinion, applied *noscitur a sociis* and found it meant that the ESA "term 'harm' should be interpreted

---

surest guide to its meaning. The same dictionary FWS relies on (though an earlier version, to reflect usage when the ESA was passed) to show that "harm" means "injure" (Pet. at 13) defines "injure" as meaning "to inflict bodily hurt on" and notes that "HARM stresses the inflicting of pain." *Webster's Third New International Dictionary (Unabridged)* 1164 (Merriam 1968). That meaning would certainly be consistent with the conclusion below that "harm" refers to actions substantially directed at wildlife. *E.g.*, Pet. App. 4a-9a.

to include only those actions that are *directed against*, and likely to injure or kill, individual wildlife"—a meaning that closely parallels the result reached by the court below. 46 Fed. Reg. 29491 (June 2, 1981) (emphasis added).[11]

Finally, FWS makes the alternative argument that the court employed the wrong unifying theme in applying *noscitur a sociis*. Instead of the "substantially direct application of force" concept applied by the court, FWS prefers, once again with no supporting authority, a concept centering on conduct that will "result in some reasonably ascertainable and proximate injury (or death) to the protected species." Pet. at 16. This not only, again, puts FWS at odds with both the Ninth and D.C. Circuits, but also distances the agency from the ordinary meaning of "take"—"to get into one's hands or into one's possession," or "to catch, seize, or attack through the effect of a sudden force or influence." *Webster's Third New World Dictionary of the English Language (Unabridged)* 2329 (1968).

3. With no more than this, there is little reason for this Court to exercise its discretionary review power. This conclusion is all the more apparent in light of FWS's failure to rebut the strongest indicators of the will of Congress. First, FWS's interpretation of "harm" makes large parts of ESA §§ 5 and 7 superfluous, while the D.C. Circuit's interpretation retains a rational structure

---

[11] If "harm" does refer to actions that are directed at and do injure wildlife, it would not make "harm" surplusage as Petitioners suggest (Pet. at 16 n.15). As FWS points out (Pet. at 13), "harm" is defined in ordinary usage to mean "injury." Since the ESA definition of "take" does not include "injury," this gives "harm" a meaning that is independent of, but closely aligned with, the other "take" concepts (actions directed at wildlife). While the *de facto* definition of "harm" effected by the court's decision thus does not make "harm" surplusage, the converse is not true; Judge Sentelle seems to be right in observing that the "harm" regulation makes all the other "take" terms surplusage. *See* Pet. App. 25a and 71a-72a.

for the ESA.[12] Second, the explanations of both the Senate and House floor managers attest to the intended dichotomy between habitat modifications and takings, with the latter to be prohibited under ESA § 9 while the "distinct problem" of habitat modifications that might indirectly injure listed species would be addressed through acquisition of non-federal lands under ESA § 5 (and constraints on federal agencies under ESA § 7). *See* 119 Cong. Rec. 25669 (July 24, 1973) (remarks of Sen. Tunney); 119 Cong. Rec. 30162 (Sep. 18, 1973) (remarks of Rep. Sullivan).[13] A 1974 law review article

---

[12] *See* Pet. App. 7a-8a and pages 4-5, *supra*. This point, conceded years ago by a leading environmental advocate (*see* Pet. App. 93a), is apparently conceded by Petitioners as well. Additionally, FWS's interpretation largely renders meaningless the rulemaking process with public involvement and assessment of "economic impact" that ESA § 4 requires to designate critical habitat. *See* 16 U.S.C. § 1533(a)(3) and (b)(2). FWS's view of "harm" allows the agency to avoid the rulemaking requirement entirely and to protect any habitat, not just designated critical habitat.

[13] FWS does not rebut these express legislative distinctions, but apparently believes they must yield to a Committee Report statement that "take . . . include[s] every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Pet. at 15-16. Yet this seems an unhelpful circular statement that "take" means "take," as Judge Sentelle observed below. Pet. App. 71a.

FWS excuses as irrelevant the Senate Committee's earlier deletion of "habitat modification" from the ESA's definition of "take," arguing that the deleted language would have made *any* habitat modification a "take." Pet. at 15 n.14. But Congress could not have intended to make all habitat-disturbing actions illegal (*e.g.*, all agriculture). Instead, § 7 of S. 1983 allowed penalties specifically against a "person who . . . takes . . . any [listed] species." Therefore, the deleted language can only be fairly read as proscribing habitat modification which indirectly killed or injured specific wildlife. *Accord Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcommittee on Environment of the Senate Committee on Commerce*, 93 Cong., 1st Sess., 104 (1973) (environmental group testimony that the expanded "definition of

analyzed this leigslative history and came to the same conclusion the court below reached 20 years later:

> Congress meant to apply taking restrictions to stop killing or otherwise harming the animal directly but reserved the acquisition power . . . as the sole remedy for protecting habitats. . . . Based on this legislative history it is clear that "taking" should not apply to commercial cutting of timber on private lands.

R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium*?, 5 Envtl. L. 29, 39-41 (1974); *see* Pet. App. 8a-9a.

Under the overbroad "harm" regulation, landowners risk criminal prosecutions or injunctions for engaging in many ordinary uses of their own lands, particularly if their lands are located in the large regions occupied by some listed wildlife. For example, FWS has threatened enforcement actions if landowners do not preserve up to 3,960 acres around each spotted owl nest site, and has sued one landowner to enjoin him from harvesting timber on a 72-acre tract that he owns because a spotted owl nest site is located 1.5 miles away on public land. *See Gidari*, 24 Envtl. L. at 426-40; note 9, *supra*. It thus seems clear enough that the court below did not engage in an "extravagant reading" (Pet. at 20) of the "harm" regulation.

---

'take' in Mr. Williams' bill [is] essential" because an animal "is just as dead if it is killed by . . . suburban or recreational development" as if it "were deliberately shot or uprooted"). Thus, there is no substantive difference between the language Congress deleted and the language FWS adopted in the "harm" regulation. *See* Pet. App. 10a.

Lastly, Petitioners argue that the "harm" regulation is somehow supported by the 1982 amendments to the ESA. Pet. at 16-17. Judge Williams addressed that point in detail. Pet. App. 10a-24a. Even Judge Mikva, in dissent, acknowledged that those amendments are insufficient to sustain the regulation (Pet. App. 39a), and none of the three other dissenters from the denial of rehearing *en banc* gave credence to the argument (*see* Pet. App. 97a-99a).

4. In the face of an inherently sound decision on the merits, FWS asserts a circuit conflict as the basis for this Court's review. It says that the decision below conflicts with the Ninth Circuit's decision in *Palila v. Hawaii Department of Land and Natural Resources,* 852 F.2d 1106, 1108-09 (9th Cir. 1988) (*"Palila II"*), and with other cases which have applied the "harm" regulation. Pet. at 21-23. Since only Sweet Home among the cited cases challenged the "harm" regulation as *ultra vires,* however, any alleged "conflict" is more illusory than real.

Although the *Palili II* court's opinion undeniably contains language generally approving of the "harm" regulation's "inclusion of habitat destruction that could result in extinction," *id.* at 1108, that language falls well short of supporting FWS's statement (Pet. at 21) that the "Ninth Circuit held" the regulation complied with the ESA. In truth, the court's language was mere *dictum* on an uncontested issue. Hawaii's appeal brief (which Sweet Home provided to the court below) did not argue that the regulation was beyond the scope of the statute. *See Sweet Home's Reply in Support of Motion to Expedite Issuance of the Mandate* at 2-5 and Attachment 1 (Apr. 22, 1994). Instead, it accepted the validity of the regulation and merely "argue[d] that the district court construed the definition of 'harm' in 50 C.F.R. § 17.3 too broadly." [14]

Since the Ninth Circuit language on which Petitioners rely for the "conflict" argument (Pet. at 21) was not "needful for the decision" (as no party put the legality of the regulation at issue), that language was *dicta*, and

---

[14] 852 F.2d at 1107-08. The State's brief (at 2-3) expressly conceded that "harm" could validly "includ[e] habitat modification" if it would result in the extinction of the species. Since the issue of including habitat modification within the "harm" definition was conceded, the *Palila II* court did not have occasion to receive argument on, or engage in, the type of detailed analysis of the Act, its structure, and its legislative history that has transpired in this case. Its decision must be evaluated in that light.

courts, of course, are not "bound by *dicta*." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, —— U.S. ——, 63 U.S.L.W. 4005, 4007 (U.S. Nov. 8, 1994). As a result, there is no fundamental conflict in the circuits. An "inconsistency in dicta" should not warrant review by this Court. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 167 (7th Ed. BNA 1993.)[15]

The *Palila II* court's *dicta* is not binding even within the Ninth Circuit. *See Ruff v. Sullivan*, 907 F.2d 915, 918-19 (9th Cir. 1990). There are indications that other Ninth Circuit panels are interpreting "take" provisions in wildlife protection laws more narrowly than the *Palila II* court did. *See, e.g., Hayashi*, 22 F.3d 859 (9th Cir. 1994) (construing "take" narrowly under the Marine Mammal Protection Act and, while expressly looking to the ESA for guidance, disregarding *Palila II*); *Pacific Northwest Generating Cooperative v. Brown*, 25 F.3d 1443, 1452 (9th Cir. 1994) (inadvertent killing of listed salmon while fishing is not an ESA "take"), *amended by*, 1994 WL 524623 (9th Cir. June 3, 1994). And indeed, there is currently pending a case in which the Ninth Circuit is asked to follow the D.C. Circuit's decision in *Sweet Home* and dismiss a claim that timber harvesting must be enjoined because the modification of foraging habitat might "harm" a spotted owl. *See Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir.) (oral argument scheduled for Jan. 12, 1995). If the Ninth Circuit does in fact follow *Sweet Home*, then any suggestion of a conflict would evaporate.

---

[15] FWS's other cited cases (Pet. at 23), which also applied the "harm" regulation in contexts where the regulation's validity was not questioned, similarly do not create a split in the circuits. 1B *Moore's Federal Practice* ¶ 0.402[2] at I-35 (Matthew Bender 1993) ("When an issue is not argued . . ., the decision does not create a precedent to be followed in subsequent cases in which such an issue arises").

Thus, there is assuredly no conflict in the sense that two circuit courts of appeals, fully apprised of the issues, have reached different conclusions on the same question. If a conflict could be said to exist, it is at best immature, since the Ninth Circuit could follow the approach of the court in this case. If a true conflict develops, there obviously will be another occasion for this Court to address the legality of the "harm" regulation.

5. Nor does this case have the "exceptional importance" FWS attributes to it. Pet. at 23. First, FWS claims that the decision below threatens an orderly regime of voluntary compliance which is manifested "in the formulation of scores of habitat conservation plans" to protect listed species. Pet. at 23-24. But FWS's claims are wildly overblown. Although it may be true that "more than 150 habitat conservation plans [have been] *submitted*" (Pet. at 24 n.22) (emphasis added), it is also true that, of that total, only 33 permits (including only six "high complexity" permits) have actually been *granted* by FWS in the 12 years since authority for such permits was added to the ESA. *See* Appendix C to *Federal Appellees's Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate* (Apr. 19, 1994). The high cost and long delays in the permit process—which often requires multi-million dollar and multi-year investments—make the process impracticable for most private landowners. *See* R. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 Nat. Res. & Env. 21, 22-23 (Summer 1993); C. Mann and M. Plummer, *The Butterfly Problem*, The Atlantic Monthly, Jan. 1992, at 69-70. Thus, any impact on the infrequently used permit process would not be significant.

The implicit suggestion of the foregoing claim, that listed species somehow cannot be protected without barring ordinary land uses as ESA takings, leads directly into FWS's second and main claim—that the "harm" regulation "is a critical tool in the effort to preserve listed

species." Pet. at 25. We do not doubt that it is an administratively convenient tool, but it is not the tool that Congress, balancing *all* the relevant and competing factors, ultimately chose. As this Court observed only recently, "[p]olicy considerations cannot override our interpretation of the text and structure of the Act"—the issue for the courts "is not whether imposing private civil liability . . . is good policy but whether [it] is covered by the statute." *Central Bank of Denver v. First Interstate Bank of Denver*, —— U.S. ——, 114 S.Ct. 1439, 1448, 1453-54 (1994).

In enacting the ESA, Congress chose *not* to protect habitat through the § 9 "take" prohibition, which applies to "any person." It fully recognized the importance of protecting habitat, but simply chose other mechanisms for accomplishing that objective. It did so through § 7, which requires federal agencies to use their authorities (over all federal lands, and all private lands where any federal agency action—*e.g.*, funding and permitting—is necessary to make use of those lands) to prohibit or condition any habitat-affecting actions that might jeopardize listed species or result in the destruction or adverse modification of their "critical habitat," as identified by rulemaking, and through § 5, which authorizes the federal acquisition of land and water resources in order to protect listed species. By choosing these mechanisms, Congress achieved its objective of providing for habitat protection without unnecessarily intruding on private property rights or imposing a disproportionate share of the cost of securing a "public good" upon individual private citizens. *See* Pet. App. 6a-9a.

Those tools are doubtless less convenient and more expensive—for FWS—than simply continuing to apply the "harm" regulation to constrain citizens from making ordinary uses of their lands. But they are the only tools Congress provided.

When FWS quotes this Court's statement in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("*TVA*"),[16] that the ESA was intended to "reverse the trend towards species extinction," we take it for granted that the Court was not authorizing excursions beyond the boundaries of that statute. *See National Wildlife Federation v. Burlington Northern RR*, 23 F.3d 1508, 1512 (9th Cir. 1994). "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 1508 (1994). Under the ESA's compromise with private property rights, habitat protection on non-federal lands is to occur through § 7's funding and permitting controls, where applicable, and otherwise through land acquisition with compensation under § 5.

Thus, the "exceptional importance" of this case resolves itself into a matter of administrative convenience. The decision below *does* protect the habitat of listed species—it simply requires FWS to honor and to utilize the mechanisms provided by Congress in order to achieve that objective.

6. Finally, this case presents a quite separate difficulty which militates against a grant of certiorari. That is the

---

[16] Pet. at 26. On the chance that FWS might be suggesting that the decision below is somehow inconsistent with *TVA*, we note that the "harm" regulation was not at issue in *TVA*. 437 U.S. at 172. The lower courts had found violations of ESA § 7, not ESA § 9. *See Hill v. TVA*, 419 F. Supp. 753, 755 & n.1 (E.D. Tenn. 1976), *aff'd in pert. part*, 549 F.2d 1064, 1069-70 & nn.13-14 (6th Cir. 1977). The Court observed that it was not reviewing the existence of ESA violations, but only whether injunctive relief should issue and whether an implied repeal had occurred. *See* 437 U.S. at 156, 171-72. In commenting on the reach of the "harm" regulation in a footnote, the Court was assuming its validity; it was careful to make plain that no one in that case was arguing or "suggest[ing] that the Secretary exceeded his authority . . . in issuing the regulations." *Id.* at 172, 184-85 n.30.

issue identified by Judge Silberman (joined by Chief Judge Mikva and Judge Wald) in the dissent from the denial of rehearing *en banc*. Judge Silberman was unsure that the premise of *Chevron* deference was warranted. He pointed out that where, as here, a statute contemplates criminal enforcement, the agency's discretion to resolve statutory ambiguities may well be more constrained than is normally presumed under the *Chevron* standard. Pet. App. 97a. Indeed, the same rule of lenity that ordinarily applies to constrain prosecutors and the courts from giving broad readings to criminal statutes ought similarly to limit an agency's discretion to give a broadening interpretation to a statutory provision.[17]

Since the panel decision found there was a discernible legislative intent, it did not have to address the implications of Judge Silberman's analysis regarding *Chevron* deference. Pet. App. 95a. But if the panel was wrong in that determination, it would assuredly be necessary to consider the issues raised by the agency's broadening interpretation of a criminal provision.

Unlike any of the other issues presented by the case or raised by FWS, the issue of the application of *Chevron* to criminal statutes does have some broad jurisprudential sig-

---

[17] Under the ESA, "harm" can be prosecuted criminally with no heightened standard. *See* note 3, *supra*. Accordingly, the rule of lenity should apply (even in civil contexts) and it requires courts to "resolve the ambiguity in [the defendant's] favor" by applying the narrower interpretation. *United States v. Thomson/Center Arms Co.*, —— U.S. ——, 112 S.Ct. 2102, 2109-10 (1992) (plurality opinion of Justices Souter, Rehnquist and O'Connor); *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (concurring opinion of Justices Scalia, O'Connor and Kennedy that the rule of lenity prevails over *Chevron* deference to the agency). Therefore, even if FWS were correct that the ESA meaning of "harm" is ambiguous, the rule of lenity should still compel the narrower meaning, which would not criminalize ordinary land use activities. *See also United States v. X-Citement Video, Inc.*, —— U.S. ——, 63 U.S.L.W. 4019 (U.S. Nov. 29, 1994).

nificance. It might be an issue appropriate for this Court to consider in a proper case; but this is not the proper case. The issue was not addressed below, and apparently has not been as yet the subject of extensive judicial discussion elsewhere. In these circumstances, the Court's involvement in this issue would seem premature. If certiorari were to be granted, however, there is little question that this issue would have to be reached, because it is unlikely —in light of Judge Silberman's opinion—that the validity of FWS's interpretation could be addressed without at least considering the "criminal" issue.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

*Of Counsel:*

WILLIAM R. MURRAY
AMERICAN FOREST &
PAPER ASSOCIATION
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036

JOHN A. MACLEOD *
STEVEN P. QUARLES
CLIFTON S. ELGARTEN
THOMAS R. LUNDQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
*Attorneys for Respondents*

December 8, 1994

* Counsel of Record